UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

No. 1:13-cv-12631-WGY

IN RE RUSSELL INVESTMENT COMPANY
SHAREHOLDER LITIGATION

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For Hearing Before:
Judge William G. Young
at Boston College Law School

Summary Judgment

United States District Court
District of Massachusetts (Boston)
One Courthouse Way
Boston, Massachusetts 02210
Tuesday, November 15, 2016

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P R O C E E D I N G S

(Begins, 10:05 a.m.)

THE CLERK: Now hearing Civil Matter 13-12631, McClure versus Russell Commodity.

MR. MURPHY: Good morning, your Honor, Sean Murphy from Milbank, Tweed, Hadley & McCloy, for the Russell defendants.

THE COURT: And who's for the plaintiff?

MS. DIXON: Good morning, your Honor, Jenny Dixon on behalf of the plaintiff, McClure, with the law firm of Robbins Arroyo.

THE COURT: Well, let's start with you, Ms. Dixon, and let's see if we can't handle a couple of things and then, um, perhaps I need argument.

First of all, insofar as you seek to go forward on behalf of the Russell Multi-Strategy Alternative Fund, that's dissolved, you don't have standing as to that, so that's out, right?

MS. DIXON: Correct, your Honor.

THE COURT: Fine.

Second, and I'm just curious, you styled this a -- that you want a jury, but I wouldn't have thought, reading this, that this is a jury case.

This is a bench trial, isn't it?

MS. DIXON: Yes, your Honor, it is a bench trial.

THE COURT: Fine. And when have I scheduled it for trial?

MS. DIXON: Your Honor, we were just recently rescheduled to your docket. There is no trial date at the present.

THE COURT: So we'll deal with that now.

All right. Now -- thank you. Thank you.

(Pause.)

Well, let me start with the other side and see if that will move us along.

Having gone over the papers I think there's much to your argument except I think that as to Fall-Out benefits and profitability she ought to be able to go forward with her case. So why don't you focus on that.

You disagree with that?

MR. MURPHY: I do disagree with that, your Honor, respectfully.

So this case is unusual. There's a lot of these cases out there right now under Section 36(b) of the 1940 Act and this case is unusual in the sense of how narrow the Fall-Out benefits issue is and how clear it is not a Fall-Out benefit as a matter of law.

As I understand the plaintiff's argument, there's a single Fall-Out benefit. They say that the administrator, the defendant administrator, RFSC, gets a

Fall-Out benefit of about $8 million in what I'll call "avoidance costs," in other words they don't have to spend money on administrative services to institutional clients that they could otherwise charge for. That's not a Fall-Out benefit as a matter of law, your Honor.

If you look at the test for Fall-Out benefits set up by ***Krinsk*** in the Second Circuit back in the 1980s, the test is a but-for test, it's very exacting, you have to show that's a benefit that --

THE COURT: Well, much as I respect the Second Circuit, that's persuasive but not controlling.

MR. MURPHY: I totally agree, your Honor, but that -- the but-for test has been repeated not just in the Second Circuit, it's been widely repeated by courts across the country.

THE COURT: Not in the first circuit.

MR. MURPHY: Not in the First Circuit -- not in the First Circuit but widely accepted that the test is but-for, some courts say as a result of, but it's a very exacting test, and for this one benefit, your Honor. I have two responses.

First, it's not a Fall-Out benefit as a matter of law, and I would point again to -- not a First Circuit case but the ***Gallus*** case, 497 F. Supp. 2d at 981, it's cited in our brief. There the District Court, at the

summary judgment stage, rejected a nearly identical Fall-Out benefit and said it's not a Fall-Out benefit as a matter of law.

The second point I would make, your Honor, is that even if you accept it's a Fall-Out benefit -- and again there's a case on point that says it's not, but even if you would --

THE COURT: I guess my concern, and I'm following your argument here, but my concern is the more factual concern on summary judgment, that here I have to accept, as you acknowledge, that they --

They get this $8 million profit, right?

MR. MURPHY: It's more of a cost avoidance I think is the argument. I think what they're saying is --

THE COURT: Very well, and you're right, an $8 million cost avoidance, savings. Now, you say -- so accepting that -- accepting that, does that give us a triable issue here?

MR. MURPHY: Well, no, I'm not -- I'm accepting that's the allegation, but I'd say, as a matter of law, that it's not a Fall-Out benefit if you follow the reasoning of the ***Gallus*** case, and again it's not binding but at least one court has rejected it at the summary judgment stage. So that's one argument.

Two, is even if you do not -- following my

argument if you disagree with that court, the next stage of the argument is how material is it to the analysis, right? You can't just say, "Well, they made a dollar and that would have changed the analysis," if you look at the amount of the advisory fees they're substantial in dollars, I admit that, and you have to say, "Well, that $8 million is a benefit across the entire complex of mutual funds managed by Russell, and you have to say if the board that approved these fees, right, they're approved by an independent board of directors -- and you should defer to their business judgment unless there's something to impugn the process, how would that $8 million have affected the board, would they have said, "Well, across all 50 funds that $8 million was so substantial they would have come out differently"? You have to show it's material to the board's analysis or your analysis in assessing the fees, and to do that what you're supposed to do under the law is say, "How much of that $8 million is it for the funds that are being challenged here?" There are 10 funds at issue.

THE COURT: Yes, now, um, for argument, I accept all of that.

MR. MURPHY: Uh-huh.

THE COURT: And so we ought to have a trial.

(Laughter.)

THE COURT: And you'll tell me all that and you'll support it and I will be persuaded, you hope. But what I see as the force of that argument, I just -- I have to take -- this is summary judgment, I have to take every reasonable inference her way, that's my problem here, and that's why I said, "Well, when are we going to trial on this?" It's before me. I'm available. We can get this to trial pretty quickly. And this seems to -- the facts don't seem to be in dispute here or are they in dispute?

MR. MURPHY: Well, I mean -- so I would argue that, um, they are in dispute at some level, but I would say, even if I lost those, there's still not a genuine issue of material fact in dispute because you just said it, your Honor, you just said it, we're not disputing the facts.

THE COURT: You can't at this stage, I understand that.

MR. MURPHY: Yeah. So I would say that even if you accept their argument, as a matter of law you can say it's not a Fall-Out benefit.

THE COURT: A few minutes on profitability.

MR. MURPHY: So profitability, your Honor, I think is an even easier one. There if you look at the profit margins calculated by my client, the defendant, and

given to the board, if you look at those profit margins you can compare those to cases under 36(b) where courts have found profit margins to be reasonable in the same range, and there, your Honor, I would point to the ***Schuyt vs. T. Rowe*** price case where profit margins of 77 percent were found to be reasonable. All of my client's profit margins are below that except a couple that are just above it, so you're in the range. That's not in dispute, that's not going to change a trial.

So what is the plaintiff's argument? The plaintiff's argument is not that those margins are above what other courts have found to be reasonable, their argument, your Honor, is they're putting on an expert to say, "Well, we've recalculated the profit margins, we understand that your profit margins are consistent with GAAP, the Generally Accepted Accounting Principles, but we're going to say there's no accounting rules that apply, that we can calculate them however we want and come up with really high profit margins." And they're under seal, your Honor, so I'm not mentioning, for confidentiality reasons, what they are, but they're much higher than the ones that are calculated using Generally Accepted Accounting Principles.

THE COURT: But you see, um, we're all in the same ballpark here, what you're saying to me comes at no

surprise, it's just that that sounds like factfinding to me. I -- yeah, they're going to put on an expert who's going to try to say what you say he's going to try to say and I suppose maybe I'll listen to it. Maybe, from your point of view, that's not a reliable method on reliable facts and under Rule 702 I just won't hear it, maybe it will go off that way, but it sounds like factfinding, and since I have that expert, so-called, opinion, that sounds like that gets them a trial.

MR. MURPHY: In fairness, your Honor, so this issue came up in the ***AXA*** case, ***Sivolella***, and it came up in the ***Hartford*** case, and I should disclose that I represented Hartford and AXA in both of those cases and I think as you know I'm in the middle of the Hartford trial right now, so I appreciate at summary judgment the judge found that to be a fact issue, I concede that, but I will say that I think the record is much clearer here in terms of them conceding that our profit margins are consistent with Generally Accepted Accounting Principles. And we also have a ruling from the judge, Judge Sheridan in the District of New Jersey, where he rejected this argument, I would say as a matter of law, and said that "The defendant's method of calculating profitability is consistent with accounting methods," in the exact context.

THE COURT: All right.

MR. MURPHY: And I would submit that you don't need a trial to reach that same conclusion in light of where Judge Sheridan came out.

THE COURT: All right. I hear you and I understand. Let me hear from Ms. Dixon.

Ms. Dixon, if I let it go forward on those two and roomed out the rest of it, you're fine with that, aren't you?

MS. DIXON: Well, your Honor, we do believe that there are factual disputes as to the other issues as well as --

THE COURT: But you're -- as a practical matter you're fine with it, you get your trial, um, and, you know, if I get some sort of rush of blood to the brain once we really see, um, that there are supposedly improprieties, um, it just seems to me they have you on everything else but those two.

THE COURT: Well, your Honor, we respectfully do disagree on a number of factors. I do see your point. I think there are questions of fact, as your Honor has noted, that go to many of these points.

THE COURT: But go to those two?

MS. DIXON: Undoubtedly go to those two, and we believe and, um, would go to the other points as well,

and, you know, in particular there's both -- the profitability for the advisory claims as well as the profitability for the administrative claims. So I believe that both of those issues are in play and would be appropriate for trial as well as Fall-Out benefits for both as well.

Um --

THE COURT: But that's the easy part, that's the part that I'm signaling, um, you probably squeak by summary judgment, but the rest of it they win, don't they, as a practical matter?

THE COURT: Well, when you say "the rest of it," your Honor, you're referring to -- because -- you recall the standard is all relevant circumstances, um, and facts that go to address the disproportionality of the fees.

The cost issue, for example, bears heavily on the profitability. You look at disproportionality, one way to do it is defendants want to -- they've argued an array of services in their papers, but the more concrete way to look at what services do the defendants provide is what costs do they incur in providing them?

THE COURT: Well, let's grab onto it this way. He started out his argument, arguing for a determination as a matter of law, by focusing on how I should view the

board's determination, and he's right on that.

Won't you give him that?

MS. DIXON: Well, ***Jones*** says that even with an impeccable board process -- and there are disputed facts on that issue in the record, but even with an impeccable board process there's still -- you still look at the substance of the fees. And here, your Honor, looking at --

THE COURT: But I'm prepared to do that. Do you see what I'm saying?

MS. DIXON: Yes, your Honor.

THE COURT: I'm saying that I think he's right as to the degree of deference, um, to be given to the board, as a matter of law, and then I'm going on to say, notwithstanding his able argument, that at least as to the nature and quality of the services, the Fall-Out benefits, and the profitability, we ought have a prompt jury-waived trial.

And you're fine with that, aren't you?

MS. DIXON: Yes, your Honor.

THE COURT: All right, fine, that's the order.

When are we going to go to trial? We're ready, aren't we, on this case?

MR. MURPHY: Um --

THE COURT: I mean you can't be at two places at

once --

(Laughter.)

THE COURT: -- and I certainly want you to ably defend them, um -- and don't take any comfort from this, but the problem is -- well, it isn't a problem, it's that I am faithful, I think, to the Rule 56 charge, I've given you every reasonable inference. And so we're clear as to the degree of deference I'm going to give to the board. I think they get a trial. It's not a long trial.

Is it?

MR. MURPHY: Your Honor -- and I don't know if you envision any sort of ruling beyond what you're saying today, but if --

THE COURT: I do not.

MR. MURPHY: Okay. So if we're clear that we're only trying, um, the several factors, which I'm trying to think are Fall-Out benefits and profitability --

THE COURT: And quality of services.

MR. MURPHY: -- and quality of services, so that would be a very abbreviated trial. And I can speak from experience here. So in ***AXA*** we tried all of the ***Gartenberg*** factors and it was 7 weeks. In ***Hartford*** we're trying -- the judge only made the board factor and we did the trial in four days. So I would say four

days, um, we could shoot for and if we need more time we can tack something on on the back end.

THE COURT: Jury-waived, that's easy for me. So when are you ready? You're talking my -- I like what you're saying.

(Laughter.)

THE COURT: What do you say, are you people ready?

MS. DIXON: Well, I would need to consult with my colleagues, your Honor.

THE COURT: That doesn't work here.

MS. DIXON: Okay.

THE COURT: You've got a cell phone, go out in the hall, you can consult with whoever you want to consult with, but don't go away, we'll call you again. So that's the order of the Court, it's allowed in part and denied in part, and we will call the case a second time to see about the trial schedule.

MR. MURPHY: And, your Honor, just one point. We do want some type of pretrial briefing built in.

You're not suggesting a trial next week or anything?

THE COURT: Um, no, I don't think so, but I'm available.

MR. MURPHY: Okay. Okay, your Honor.

MS. DIXON: Your Honor, do you have a time period

that you were thinking of, January, February, or are we talking before Thanksgiving? Because there are a number of witnesses, experts --

THE COURT: Oh, but, you know, planes fly, subpoenas can be issued, and so come back and say "the judge is eager to go to trial on this important case" and we'll see where we are.

Thank you very much.

(Recess, 10:25 a.m.)

(Resumed, 11:14 a.m.)

(Mr. Murphy not present.)

THE CLERK: McClure versus Russell Commodity.

THE COURT: Okay, and now I'm calling my bluff here, so as a serious matter when do you want to go to trial?

MS. DIXON: Late February, early March, your Honor, that the parties have conferred and checked our schedules.

THE COURT: I'll put you on the March running trial list?

MS. DIXON: That sounds wonderful.

THE COURT: Fine. I do two weeks to file a joint proposed case management schedule between here and there, you're on the March running trial list, which means by the first Monday of February I want, under our

rules, a final pretrial memorandum. And the rule doesn't make it clear whether it's joint, it is joint, and that costs you a lot of money, you have to list all your witnesses, all your exhibits, that type of thing. And now -- yeah, I think that's it. Thank you very much.

MS. DIXON: Thank you, your Honor.

MR. CARNATHAN: May I just clarify, your Honor, is that nine full trial days?

(Interruption by Court Reporter.)

THE COURT: Yes, would you identify yourself.

MR. CARNATHAN: I'm sorry, your Honor, Sean Carnathan for the Russell defendants, pinch-hitting for Mr. Murphy.

THE COURT: Yes, Mr. Carnathan, 9:00 to 1:00 trial days, but as you know, um, and we have done a study, that's within 40 transcript pages of the so-called "full-day," 10:00 to 4:00, and I start promptly at 9:00. Thank you both.

MR. CARNATHAN: Thank you, your Honor.

THE COURT: We'll recess.

MS. DIXON: Your Honor, one moment?

THE COURT: Yes.

MS. DIXON: Previously there was discussion as to the number of trial days, counsel has conferred and also

believed, would we submit that in our papers?

THE COURT: It's required in the final pretrial.

MS. DIXON: Right.

THE COURT: Because hope springs eternal that you might settle. If you did not settle entirely, conceivably you would settle partially. The rule says you tell me the number of trial days and we will work it out at the final pretrial.

MS. DIXON: Thank you very much, your Honor.

THE COURT: Thank you both.

We'll recess.

(Ends, 11:15 p.m.)

C E R T I F I C A T E

I, RICHARD H. ROMANOW, OFFICIAL COURT REPORTER, do hereby certify that the foregoing record is a true and accurate transcription of my stenographic notes before Judge William G. Young, on Tuesday, November 15, 2016, to the best of my skill and ability.

/s/ Richard H. Romanow 11-17-16
_____
RICHARD H. ROMANOW Date